

September 29, 2017

The Honorable Scott Pruitt, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington DC 20460

Re: State of Minnesota Assumption of Section 404 of the Federal Clean Water Act

Dear Administrator Pruitt:

Thank you for taking the time to meet with Governor Mark Dayton, Pollution Control Agency Commissioner John Linc Stine and the Governor's staff in Saint Paul on July 19, 2017. The potential for State "assumption" of the federal Clean Water Act (CWA) Section 404<sup>1</sup> permitting program by Minnesota was raised at that meeting, and this letter is a follow-up to that discussion.

Minnesota is interested in a purposeful dialogue toward assuming the Section 404 permitting program and implementing it at the state level in cooperation with EPA. Consistent with the concepts described in the Environmental Council of States (ECOS) *Cooperative Federalism 2.0*<sup>2</sup> document, state implementation of Section 404 can improve the efficiency and effectiveness of water regulatory decisions, and do so in a manner that is more responsive to the public. At the direction of the legislature and Governor<sup>3</sup>, Minnesota State agencies recently completed a study assessing the feasibility of assuming Section 404.<sup>4</sup> Despite considerable interest among stakeholders, 404 assumption is currently not viable in Minnesota because of barriers at the federal level that are beyond the control of the State (and other states seeking to assume Section 404).

The two most significant obstacles to Minnesota's assumption of Section 404 are:

- 1) the limited scope of assumable waters due to the U.S. Army Corps of Engineers' (USACE) interpretation of the waters they would retain authority over; and
- 2) the lack of federal funding provided to states specifically for implementation of the federal program.

Our current understanding is that the USACE has the authority to determine which waters they will retain permitting authority over when a state pursues assumption of Section 404.<sup>5</sup> An analysis of the USACE St. Paul District's criteria<sup>6</sup> indicates that, under Section 404 assumption, approximately 91 percent of the jurisdictional wetlands in Minnesota would be retained by the USACE. This means only nine percent would be assumable by Minnesota.

---

<sup>1</sup> Section 404 of the Clean Water Act regulates discharge of dredged or fill material into waters of the U.S. (33 USC §1344). Administered by the U.S. Army Corps of Engineers (St. Paul District) with oversight by U.S. EPA (Region 5).

<sup>2</sup> <https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf>

<sup>3</sup> Laws of Minnesota 2015, Special Session Chapter 4, Section 137.

<sup>4</sup> "Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study" available at: [http://www.bwsr.state.mn.us/wetlands/cwa\\_404/2015-17\\_CWA\\_404\\_Feasibility\\_Study.html](http://www.bwsr.state.mn.us/wetlands/cwa_404/2015-17_CWA_404_Feasibility_Study.html).

<sup>5</sup> 40 CFR § 233.14.

<sup>6</sup> January 25, 2017 letter from Chad Konickson, Chief, St. Paul District Regulatory Branch, USACE, to Minnesota Dept of Natural Resources, available at: [http://www.bwsr.state.mn.us/wetlands/cwa\\_404/2015-17\\_CWA\\_404\\_Feasibility\\_Study.html](http://www.bwsr.state.mn.us/wetlands/cwa_404/2015-17_CWA_404_Feasibility_Study.html).

Bemidji      Brainerd      Detroit Lakes      Duluth      Mankato      Marshall      Rochester      St. Cloud      St. Paul

St. Paul HQ

520 Lafayette Road North

St. Paul, MN 55155

Phone: (651) 296-3767

[www.bwsr.state.mn.us](http://www.bwsr.state.mn.us)

TTY: (800) 627-3529

An equal opportunity employer

In addition, USACE District criteria indicates that state implementation of this remaining nine percent would rely on case-by-case determinations to establish administrative authority, resulting in lengthy administrative processes each time an application was submitted.

Minnesota now finds itself in a similar situation to other states that have explored state assumption: Congress amended the Clean Water Act to allow the states to assume the Section 404 permitting program,<sup>7</sup> intending that the states would assume it.<sup>8</sup> However, the narrow interpretation by the USACE has effectively nullified Congressional intent and the assumption provision of the CWA by dramatically restricting the extent of waters over which a state may assume permitting authority.

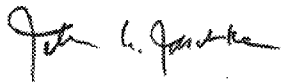
The Assumable Waters Subcommittee of the National Advisory Committee on Environmental Policy and Technology recently developed recommendations on how EPA can best clarify which waters are assumable by the states.<sup>9</sup> Minnesota was represented on this subcommittee, and we are in agreement with the majority recommendation contained in the Subcommittee's final report. Additionally, as the issue of assumable waters is addressed, please note that responsibilities associated with implementing the federal program translates to some additional costs to states. Lacking federal funding, it will be challenging to justify increased State expenditures for ongoing implementation of the federal program.

The State of Minnesota has track record of a bipartisan interest in exploring Section 404 assumption. We are seeking support and assistance from you and your staff to make Section 404 assumption more feasible and, in anticipation of changes to federal policy regarding assumable waters, for the State of Minnesota to proceed with the Section 404 assumption process.

Minnesota's strong stand-alone water and wetland regulatory programs provide a solid foundation for Section 404 assumption. Eliminating the barriers to Section 404 Assumption will make it more feasible for states such as Minnesota to assume the Section 404 program, as intended by Congress. Via inter-agency partnerships, we are committed to working cooperatively with EPA to address the barriers and to become the third state to assume Section 404 (and the first in 25 years). Please feel free to contact me or Commissioner Stine directly or let me know who to follow-up with from your staff. Your staff are also welcome to contact Les Lemm, Wetlands Section Manager for the Board of Water and Soil Resources at [les.lemm@state.mn.us](mailto:les.lemm@state.mn.us) or (651)296-6057.

We appreciate your consideration and look forward to working with you on this and other issues relating to the protection of our environment for the health and enjoyment of our citizens.

Sincerely,



John Jaschke  
Executive Director  
Minnesota Board of Water and Soil Resources

cc: Tom Landwehr, Commissioner, Minnesota Department of Natural Resources  
John Linc Stine, Commissioner, Minnesota Pollution Control Agency  
David Ross, Assistant Administrator, EPA Office of Water  
John Goodin, Acting Director, EPA Office of Wetlands, Oceans, and Watersheds  
Robert Kaplan, Acting Administrator, EPA Region 5

---

<sup>7</sup> 33 U.S.C. § 1344(g)(1).

<sup>8</sup> 33 U.S.C. § 1251(b).

<sup>9</sup> "Final Report of the Assumable Waters Subcommittee, May 2017" available at: <https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report>.